Law and the Public's Health

PUBLIC HEALTH "MALPRACTICE" AND THE OBESITY EPIDEMIC

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This installment of *Law and the Public's Health* examines the role of law in addressing the U.S. obesity epidemic. After a background and overview that considers the legal duty of public health to act in the face of documented public health threats, this article examine how the tools of governmental authority can be brought to bear on this profound public health threat.

BACKGROUND AND OVERVIEW

Many of the most important historical advances in public health have occurred when government legal powers join with scientific developments and demonstrated public health deficits to create change. Improvements in health status resulting from water treatment and waste disposal standards to reduce tropical diseases through public-sponsored pest eradication are evidence of this phenomenon.

Health leaders ranging from the U.S. Surgeon General[1] and the Director of the Centers for Disease Control and Prevention (CDC)[2] to the Institute of Medicine (IOM)[3] have called for immediate action to address the threat of the U.S. childhood obesity epidemic. Obesity has been conclusively linked to increases in cardiovascular disease, diabetes, musculoskeletal problems, and other adverse outcomes,[4–6] and its cumulative fiscal costs are likely enormous.[7,8] In addition to alarming trends in adult obesity, childhood obesity rates have tripled over the past three decades.[9] The 2003–2004 National Health and Nutrition Examination Survey (NHANES) data estimate that 33.6% of those aged 2–19 years were at risk for overweight or overweight.[9] At the same time, clinical conditions that were once limited to overweight adults are now seen in teens and children. The public health implications of this threat are clear—approximately 50% of adolescents with a body mass index (BMI) ≥95th percentile become obese adults,[10] and 70% of these adolescents are more likely to become overweight or obese adults[11] who will be at high risk for costly obesity-related health problems.

Building on national research recommendations, one state (Arkansas) passed legislation in 2003 to create a comprehensive, integrated, statewide child and adolescent obesity initiative that incorporates BMI assessment of school students and reporting to parents, restricted access to non-nutritive foods in the school environment, and education for students and families regarding optimal nutrition and physical activity.[12] Early results hold promise that the epidemic there has been slowed.[13,14] However, despite overwhelming evidence of the public health threat represented by childhood obesity, most states have not yet enacted similar legislation.

Do state lawmakers have a legal duty to act in the face of a public health threat?

Use of the law generally is a long supported and effective practice to advance public health. In particular, addressing the public health threat of the obesity epidemic through use of the law has been suggested by Mello et al.[15] Recently, Professor Lawrence Gostin stated that government intervention to address the obesity epidemic may be "justified to regulate harms that are apparently self-imposed, but also are deeply socially embedded and pervasively harmful to the public."[16]

Police power authority supports state actions and interventions targeting public health issues. The question begged for consideration is: do state public officials—lawmakers and the public health agencies whose activities they authorize and fund—have a corollary legal *duty* to intervene in the public health arena? Following then, if that duty exists, can failure to act be thought of as a form of public health malpractice?

While the Supreme Court held in *DeShaney v Winnebago County Department of Social Services Department*[17] that there generally is no federal constitutional duty of state officials to rescue or protect, especially from privately inflicted harms, the legal analysis should not stop there. Other theories may give rise to a legal obligation of state actors to intervene in the public's health.

One such concept is that of "public health malpractice" stemming from a failure to responsibly execute a legal duty owed under another aspect of federal constitutional law. This failure might be analogized to medical malpractice. The concept of public health

malpractice can perhaps be best understood by reviewing the legal doctrine of medical malpractice, whose underlying concepts consist of a legal duty of care that, when breached, results in injury to a patient. In effect, "but for" the negligent action (or failure to act) of the health-care provider, the patient would not have suffered harm. To prevail in a medical malpractice claim, the plaintiff must prove four elements: *(1)* a legal duty of care, *(2)* a breach of the duty through improper action or inaction, *(3)* a compensable injury, and *(4)* legal causation.

Under the Constitution, governmental powers are allocated between the states and the federal government. Federal congressional powers, for example, whose results are reviewed frequently in this column, include the power to regulate interstate commerce, raise taxes, and expend public dollars.[18] Aside from such expressly reserved federal powers, the Constitution, through the 10th Amendment, reserves to the states all other power and authority to act.[19] Prime among these are "police powers" (i.e., use of state authority to support actions that protect the public's health, welfare, safety, and morals). Courts have upheld a vast range of state public health laws supported by this authority, recognizing the 10th Amendment as the "core constitutional authority for public health practice."[20]

Is it reasonable to infer that the states' police power authority is accompanied by a corollary duty for states to exercise this power to protect the health of the public from known and measurable threats? If so, can this inference of duty be made in such a manner that comports with or is distinguishable from the *DeShaney* holding? Ultimately, the question when framed employing a malpractice context is whether the *power* to act equates with an enforceable federal legal *duty* to protect the health of the population.

Clearly, states have power to act to advance public health and protect the public. However, the *DeShaney* Court resisted finding either a *duty to act* by state officials or remedy for individuals harmed when the state fails to act. Additionally, when considering the obesity epidemic, we should incorporate the fact that individual harm can be lessened through individual actions (i.e., following a nutritious diet and healthy exercise regimen).

However, as is readily apparent, the aggregation of this individual harm has a population-level impact and there is evidence that population-based interventions show promise to reduce the aggregate harm. If there is not an enforceable duty on the part of state officials that accompanies police power authority, is there at a minimum a political imperative for state officials to act when that intervention can avert or ameliorate public harm caused by the obesity epidemic?

Others have advanced the concept that the individual malpractice model can be extrapolated to the public setting (e.g., failure by governments to support folic acid fortification of food[21]). Former U.S. Surgeon General C. Everett Koop made just such an accusation to the U.S. Senate in 1998 when it failed to pass a tobacco control bill. By "ignoring the advice of every health professional in America" regarding the ill effects of tobacco use, the Senate had, by his estimation, committed public health malpractice.[22]

Childhood obesity as a public health threat

Public health officials have recommended a range of actions to address the obesity crisis,[23] many of which fall within the scope of the police powers granted to states to prevent or reduce public health threats. Although obesity manifests itself as an individual condition, because of the potential fiscal threat to the health-care system (e.g., obese individuals demonstrate increased utilization of services, and in the population-based aggregate these individuals place burdens on an economically stressed system and imperil the system's fiscal ability to deliver services to all—obese and non-obese), it also embodies characteristics of a public health threat.

Many national recommendations regarding obesity center on government interventions during prepubescent and adolescent years. Recommendations by the American Academy of Pediatrics,[24] the IOM,[3] and others called for public intervention. For example, the IOM report proposes a comprehensive national strategy that includes specific actions to be undertaken by families, schools, industry, communities, and government.[25]

The State of Arkansas focused on broad, multifaceted initiatives through passage of Act 1220 of 2003.[12] Elements of the Act and subsequently promulgated Arkansas Board of Education rules[26] that promote child health in the scholastic environment include restricting student access to vending machines and non-nutritive foods, healthy school food requirements, increased physical activity mandates, and annual transmission of health information to parents that includes each student's BMI. This coordinated strategy, intended to engage, inform, and activate parents, schools, and community leaders,[27] is now in its fourth year of statewide operation and appears to be positively changing the child health environment and altering the trajectory of the childhood obesity epidemic in the state.[13,14,28]

Implications for public health policy and practice

In general, the use of 10th Amendment powers augmented by states' powers under their own constitutions to advance the public's health and, in particular, to reduce childhood obesity may be one of the most important exercises of state power to act in the public's health. The compelling question for consideration is whether the exercise of this power to protect and advance public health is discretionary or whether a duty to act accompanies the power, a duty grounded in the social contract created when governmental authority is legitimized through the democratic process.

In light of the pervasive present and future harm caused by obesity, and the potential to reduce that harm through state-supported, population-based interventions, it is incumbent that state officials in all jurisdictions consider whether they have a duty and obligation to exercise their police power authority in furtherance of the public's health.

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